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No. 07-699

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IN THE

Supreme Court of the United States

FIVE STAR PARKING,

Petitioner,

v.

UNION LOCAL 723, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

STATEMENT

Petitioner Five Star Parking respectfully submits this reply in further support of its Petition for Writ of Certiorari. Respondent Local 723, Affiliated with the International Brotherhood of Teamsters' Brief in Opposition highlights the wisdom and necessity for this Court to address the question presented, which Respondent leaves untouched and unanswered.

ARGUMENT

Conflicting decisions have placed employers and unions in an untenable position regarding reopener bargaining. Parties on both sides of the table need guidance from this Court concerning the applicability of federal labor law to this frequent occasion of collective bargaining.

It is undisputed on this record that the CBA is silent as to "whether Five Star can unilaterally implement its position if re-opener negotiations become deadlocked." (Resp. Br. at 3; *see* App. 26a). The record undeniably presents this vital question:

When parties to a collective bargaining agreement, negotiating mandatory terms of bargaining pursuant to an economic reopener provision in the agreement, reach an impasse, is the employer's decision to implement its final offer on impasse a right that is governed by the National Labor Relations Act and falling under the primary jurisdiction of the National Labor Relations Board, where the reopener provision in the agreement does not make such implementation subject to arbitration?

Respondent did not even address the fundamental guideposts established by this Court recognizing that when parties negotiate mandatory terms of a new or renewal CBA to a good faith impasse, the NLRA grants the employer the right to unilaterally implement its last offer. *See, e.g., Litton Fin. Printing Div., A Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 198 (1991) (employer may unilaterally implement after impasse when negotiating a replacement for an expired CBA); *NLRB v. Katz*, 369 U.S. 736, 745 (1962) (employer may unilaterally implement after impasse when negotiating the terms of an initial CBA). This Court further held that when an impasse has been reached in reopener negotiations, the Union retains its right to strike unless the CBA expressly waives that right. *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293-294 (1957). These cases are the necessary backdrop to the issue at bar.

This Court has yet to extend its decision in *Lion Oil* to its logical conclusion that when parties to a CBA negotiating pursuant to a reopener provision reach a good faith impasse, both parties retain all of their economic weapons including the employer's right to unilaterally implement its final offer. The present appeal is the perfect vehicle to further the development of this important issue because the CBA is admittedly silent on the issue and the question was preserved in the courts below.

The remainder of Respondent's Brief simply points to factual differences among the decisions on both sides of the divide. The reality is that some courts (and the NLRB) have held that when an employer and a union negotiate pursuant to an economic reopener provision

in the CBA, the NLRA allows the employer to unilaterally implement its final offer after bargaining to a good faith impasse. *See, e.g., Local Union No. 47, Int'l Bhd. of Elec. Workers v. N.L.R.B.*, 927 F.2d 635, 643-644 (D.C. Cir. 1991); *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, 939 F.2d 1392, 1404 (10th Cir. 1991); *Speedrack, Inc.*, 293 N.L.R.B. No. 128, at 4-5 (May 17, 1989); *see also Newspaper Guild of Salem, Local 105 of the Newspaper Guild v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1283-84 (1st Cir. 1996). Other courts, including the Third Circuit in the present case, have held that the operation of reopener agreements and the remedies thereunder arise from the CBA and are arbitrable. *See, e.g., General Drivers and Helpers Union, Local No. 554 v. Mid-Continent Bottlers, Inc. (Omaha Division)*, 767 F.2d 482, 485 (8th Cir. 1985); App. 1a.

In other words, some courts have extended the rule from *Lion Oil* to cover unilateral implementation of the employer's last offer upon impasse in reopener bargaining, and some have not. This issue presents a question of immense importance because it will govern reopener bargaining nationwide. The NLRB and some courts have recognized that unless the rule from *Lion Oil* is extended to cover implementation in the reopener bargaining context, reopener bargaining may become a "charade" rather than an important part of the collective bargaining process. *Local Union No. 47, Int'l Bhd. of Elec. Workers v. N.L.R.B.*, 927 F.2d at 644, citing *Speedrack, Inc.*, 293 N.L.R.B. No. 128, at 4-5.

CONCLUSION

For the foregoing reasons a petition for a writ of certiorari should be granted.

Respectfully submitted,

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